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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ALASKA**
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12 **MARITES G. DE LA PAZ,**

13 **Plaintiff,**

14 **vs.**

15 **MEGAN J. BRENNAN, POSTMASTER**
16 **GENERAL, UNITED STATES POSTAL**
17 **SERVICE,**

18 **Defendant.**
19

1:15-CV-00005 JWS

ORDER AND OPINION

[Re: Motion at docket 14]

20 **I. MOTION PRESENTED**

21 At docket 14, Defendant Megan J. Brennan, Postmaster General of the United
22 States Postal Service ("Defendant"), filed a motion to dismiss pursuant to Rule 12(b)(6)
23 of the Federal Rules of Civil Procedure for failure to exhaust administrative remedies.
24 Plaintiff Marites G. De La Paz ("Plaintiff") responds at docket 16. Defendant replies at
25 docket 20. She files supplemental material at dockets 19 and 22. Oral argument was
26 not requested and would not assist the court.
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II. BACKGROUND

Plaintiff filed a formal EEO complaint of discrimination on March 31, 2014. On September 2, 2014, she received the EEO investigation report.¹ The report stated that Plaintiff had 30 days to request a hearing before an administrative law judge (“ALJ”) or a final agency decision without a hearing (“FAD”) would be issued. Thus, Plaintiff’s deadline for requesting a hearing with an ALJ was October 2, 2014. The investigative report included the form necessary to request a hearing, and it outlined what would follow any final ALJ decision. Plaintiff did not request a hearing at that time, and, consequently, on November 20, 2014, the United States Postal Service (“USPS”) issued a FAD, denying her claim.² Plaintiff and her attorney received the FAD on November 24, 2014.

The FAD provided notice of Plaintiff’s appeal rights.³ Plaintiff had the right to appeal the FAD to the Equal Employment Opportunity Commission (“EEOC”) within 30 calendar days of receipt of the decision. Thus, Plaintiff’s appeal deadline was December 24, 2014. The FAD instructed Plaintiff to use Form 573 when filing an appeal with the EEOC and to mail the form to the EEOC’s Office of Federal Operations in Washington, D.C. The FAD informed Plaintiff that a copy of the necessary form was attached to the decision, and, indeed, the form was included with Plaintiff’s FAD.⁴ The FAD also informed Plaintiff that, rather than filing an appeal with the EEOC, she could bring a civil action in the appropriate U.S. District Court within 90 calendar days of her receipt of the FAD. Plaintiff’s deadline for filing a civil action was February 25, 2015.

On December 23, 2014, Plaintiff, through her attorney, filed a request for a hearing with an ALJ, even though the deadline for such a request had passed and the

¹Doc. 16-2.

²Doc. 16-4.

³Doc. 16-4 at pp. 28-29.

⁴Doc. 16-4 at p. 30

1 USPS had already issued its FAD. She sent the request to the EEOC's Hearing Unit in
2 Seattle, Washington. She did not file the requisite appeal form with the EEOC's Office
3 of Federal Operations in Washington D.C. The EEOC's Hearing Unit processed the
4 request, and the USPS then designated a representative as directed.⁵ A status
5 conference with the administrative law judge was held on March 24, 2015, and the
6 parties proceeded with discovery. Plaintiff filed her civil action with the court on May 20,
7 2015, and, given the pending civil action, the ALJ consequently dismissed the EEOC
8 complaint.⁶ Defendant filed the motion to dismiss based on Plaintiff's failure to file her
9 Title VII action within the 90-day filing period.

10 **III. STANDARD OF REVIEW**

11 A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a plaintiff's claims.
12 In reviewing such a motion, "[a]ll allegations of material fact in the complaint are taken
13 as true and construed in the light most favorable to the nonmoving party."⁷

14 The requirement for filing a Title VII civil action within 90 days constitutes a
15 statute of limitations rather than a jurisdictional prerequisite.⁸ Therefore, the motion to
16 dismiss based on the timeliness of the complaint can be brought as a Rule (12)(b)(6)
17 motion.⁹ However, the failure to comply with the 90-day requirement is subject to the
18 usual limitations defenses of waiver, estoppel, and equitable tolling.¹⁰ Such issues are
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20 ⁵Doc. 19-1; Doc. 16-6.

21 ⁶Doc. 16-9.

22 ⁷*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

23 ⁸*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 365, 393 (1982); *Scholar v. Pac. Bell*, 963
24 F.2d 264, 266–67 (9th Cir.1992).

25 ⁹*Tadesse v. Tungland Corp.*, No.13-cv-02440, 2014 WL 4755519, at *1 (D. Ariz.
26 Sept. 24, 2014); *see also Anjelino v. New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 1999)
27 (motions to dismiss for failure to file a Title VII civil action within the ninety-day filing period
should be considered under Rule 12(b)(6) and not 12(b)(1)).

28 ¹⁰*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 365, 393 (1982); *Scholar*, 963 F.2d at 267.

1 often resolved based on materials outside the pleading, and therefore “it is rarely
2 appropriate to grant a Rule 12(b)(6) motion to dismiss” when such matters are at
3 issue.¹¹ “[O]nly if the assertions of the complaint, read with required liberality, would not
4 permit the plaintiff to prove that the statute was tolled” should the motion to dismiss be
5 granted.¹²

6 Where the timeliness issue cannot be determined from the face of the complaint,
7 a motion for summary judgment is the proper procedure. Under Rule 12(d), “if matters
8 outside the pleadings are presented to and not excluded by the court, the motion must
9 be treated as one for summary judgment under Rule 56,” as long as the parties have
10 been given an opportunity to present all material that is pertinent to the motion.¹³

11 Here, Defendant raised the issue of timeliness through a Rule 12(b)(6) motion to
12 dismiss and relied solely on the complaint. It is clear from the face of the complaint that
13 it was not filed within the 90-day period. However, in response, Plaintiff raised equitable
14 tolling and estoppel defenses and filed materials outside of the pleadings. Defendant
15 then supplemented the record with her own materials in support of her argument that
16 equitable tolling and estoppel do not apply. Given that both parties have had the
17 opportunity to file materials with the court and given that the facts surrounding Plaintiff’s
18 EEOC and district court filings are not in dispute, the motion will be converted to one for
19 summary judgment.

20 **IV. DISCUSSION**

21 It is undisputed that Plaintiff filed her civil action with the court on May 20, 2015,
22 about three months after the 90-day filing deadline. It is also undisputed that Plaintiff
23 did not file the correct appeal form, or any form for that matter, with the federal
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25 ¹¹*Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006).

26 ¹²*Morales v. City of L.A.*, 214 F.3d 1151, 1153 (9th Cir. 2000) (internal quotation mark
27 omitted).

28 ¹³Fed. R. Civ. P. 12(d).

1 operations office of the EEOC. She instead filed a request for an ALJ hearing with the
2 EEOC's Hearing Unit in Seattle. Plaintiff argues that her delay in filing the civil
3 complaint is excusable because she reasonably believed she had properly filed an
4 appeal with the EEOC and did not realize that the 90-day clock was running. She
5 argues that the EEOC processed her request and the USPS participated in the ALJ
6 hearing process without informing her that such a procedure was improper and
7 untimely, thereby reaffirming her belief that the request for a hearing on her
8 discrimination complaint effectively stopped the 90-day deadline clock from running.
9 She requests that the court equitably toll the 90-day deadline during the time that her
10 request for a hearing was being processed.

11 Equitable tolling is applied so that the court can "accord all the relief necessary to
12 correct . . . particular injustices."¹⁴ "Generally, a litigant seeking equitable tolling bears
13 the burden of establishing two elements: (1) that he has been pursuing his rights
14 diligently, and (2) that some extraordinary circumstances stood in his way."¹⁵ "[A]
15 garden variety claim of excusable neglect, such as a simple 'miscalculation' that leads a
16 lawyer to miss a filing deadline, does not warrant equitable tolling."¹⁶ "Instead, a litigant
17 must show that "extraordinary circumstances were the cause of his untimeliness and
18 . . . ma[de] it impossible to file [the document] on time."¹⁷

19 Plaintiff has not shown the presence of extraordinary circumstances at play here.
20 Plaintiff's attorney filed a request for a hearing on a discrimination complaint that had
21 already been finally decided by the USPS after she failed to timely request an ALJ
22 hearing. Plaintiff and her attorney received the FAD, which indicated that she had not
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24 ¹⁴*Holland v. Florida*, 560 U.S. 631, 650 (2010) (internal quotation marks omitted).

25 ¹⁵*Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (internal citations and
26 quotations omitted).

27 ¹⁶*Id.* (quoting *Holland*, 560 U.S. at 651-52).

28 ¹⁷*Id.* (internal quotation mark omitted).

1 requested a hearing on time. The FAD clearly laid out the next steps in the process,
2 which was an appeal with the EEOC or a civil action in federal district court, not an ALJ
3 hearing. The FAD instructed her to file a specific form if she wanted to appeal the
4 decision and provided her with a copy of that specific form. There was nothing unclear
5 or inadequate about the FAD's instructions or its statement of her appeal rights.
6 Plaintiff's attorney simply failed to follow the directions. The court concludes that the
7 failure of an attorney to correctly follow directions is tantamount to a deadline
8 miscalculation, which the Supreme Court has described as "a garden variety claim" of
9 attorney negligence that does not justify equitable tolling.¹⁸

10 Plaintiff argues that mistakenly filing the wrong form is like a defective pleading
11 and that a defective pleading should not prevent her from seeking relief in district court.
12 While filing the incorrect form to in the incorrect office may nonetheless demonstrate
13 diligence on Plaintiff's part, equitable tolling also requires that an extraordinary
14 circumstance—some obstacle outside of her control—prevented her from filing the
15 proper appeal form. There was no such extraordinary circumstance here. Moreover,
16 this was not a mere technical deficiency, where the wrong form was otherwise filed
17 properly. Plaintiff did not actually file any appeal with the EEOC's federal office as
18 required; she requested a completely different procedure, and sent her request to a
19 different department in a different city.

20 Plaintiff also argues that the USPS's actions prevented her from realizing her
21 mistake in time when it appointed a representative and moved forward with the ALJ
22 proceeding. In essence, Plaintiff raises an estoppel argument. Equitable estoppel
23 requires a showing that the party to be estopped knew the true facts and intended to
24 induce reliance on his actions or statements and that the other party was ignorant of the
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26 ¹⁸*Holland*, 560 U.S. at 651-52; see also *Griffith v. Rednour*, 614 F.3d 328, 331 (7th Cir.
27 2010) ("*Holland* tells us that a simple legal mistake does not excuse an untimely filing.");
28 *Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014) (listing cases
in which attorney error did not support equitable tolling).

1 true facts and, in fact, relied on the other party's actions or statements.¹⁹ A party
2 asserting equitable estoppel against the government must show that the government
3 made an affirmative misrepresentation, actively concealed material facts, or otherwise
4 engaged in affirmative misconduct.²⁰ There has been no showing of affirmative
5 misrepresentation or misconduct here. Plaintiff relies on the fact that the EEOC
6 assigned an ALJ to the complaint, and the USPS designated a representative and
7 moved forward with the hearing. However, as noted by Defendant, the 90-day deadline
8 expired on February 25, 2015. All the EEOC did by that date was assign an ALJ and
9 ask the USPS to appoint a representative. The USPS simply complied and appointed a
10 representative. Such ministerial acts are not affirmative conduct. The fact that the
11 agency participated in a status hearing and engaged in discovery in late March, after
12 the February 25th deadline, is immaterial, as the 90-day deadline had already expired,
13 and thus, Plaintiff could not have detrimentally relied on such conduct. Plaintiff provides
14 no authority to support her argument that Defendant had a duty to inform her attorney
15 that the request for an ALJ hearing was untimely and was not the proper appeal
16 procedure.

17 V. CONCLUSION

18 Based on the preceding discussion, Defendant's motion at docket 14 is
19 **GRANTED**. The court having granted summary judgment for defendant, the Clerk will
20 please enter judgment for defendant.

21 DATED this 14th day of December 2015.

22
23 /s/ JOHN W. SEDWICK
24 UNITED STATES DISTRICT JUDGE
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27 ¹⁹*Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011).

28 ²⁰*Id.*